**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

**MONA LISA FRAZIER,**

**Plaintiff-Appellee,**

**-vs-**

**ALLSTATE INSURANCE COMPANY,**

**Defendant-Appellant.**

_____/

**Supreme Court Nos. 142545, 142547**

**Court of Appeals Nos. 292149, 293904**

**Macomb County Circuit Court**
**No. 06-3787-NF**

142545

# PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF SUBMITTED PURSUANT TO THE COURTS JUNE 17, 2011 ORDER

## CERTIFICATE OF SERVICE


**MARK GRANZOTTO, P.C.**

**MARK GRANZOTTO (P31492)**
**Attorney for Plaintiff-Appellee**
**225 South Troy Street, Suite 120**
**Royal Oak, Michigan 48067**
**(248) 546-4649**

**LAW OFFICES OF SAMUEL BERNSTEIN**

**MICHAEL A. WEISSERMAN (P36202)**
**MARK J. BERNSTEIN (P56528)**
**Attorney for Plaintiff-Appellee**
**31731 Northwestern Highway, Suite 333**
**Farmington Hills, Michigan 48334**
**(248) 865-0863**

## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

**Case** **Page**

**Statutes**

## STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT DENY DEFENDANT'S REQUEST TO REVIEW THAT PORTION OF THE COURT OF APPEALS OPINION WHICH HELD THAT MS. FRAZIER'S INJURY WAS A DIRECT RESULT OF PHYSICAL CONTACT WITH EQUIPMENT PERMANENTLY MOUNTED ON HER VEHICLE?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

II. SHOULD THIS COURT DENY DEFENDANT'S REQUEST TO REVIEW THAT PORTION OF THE COURT OF APPEALS DECISION WHICH HELD THAT MS. FRAZIER'S INJURY OCCURRED WHILE SHE WAS ALIGHTING FROM HER VEHICLE?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

III. SHOULD THIS COURT DENY DEFENDANT'S REQUEST TO REVIEW THE COURT OF APPEALS DETERMINATION THAT MS. FRAZIER WAS ENTITLED TO AN AWARD OF ATTORNEY FEES UNDER MCL 500.3148?

Plaintiff-Appellee says "Yes".

Defendant-Appellant says "No".

The defendant, Allstate Insurance Company, filed two applications for leave to appeal from the December 21, 2010 unpublished opinion of the Michigan Court of Appeals. On June 17, 2011, this Court issued an order directing the Clerk to schedule oral argument on the applications for leave. *Frazier v Allstate Ins Co*, 489 Mich 955; 798 NW2d 506 (2011). In its June 17, 2011 order, the Court instructed the parties to be prepared to address three questions:

> (1) whether the plaintiff's injury "was a direct result of physical contact with equipment permanently mounted on the vehicle" within the meaning of MCL 500.3106(1)(b); (2) whether the plaintiff's injury was sustained while "alighting from the vehicle" within the meaning of MCL 500.3106(1)(c); and (3) whether the plaintiff is entitled to attorney fees pursuant to MCL 500.3148(1).
>
> *Id.*[1]

---

[1]It is worth highlighting that there are two issues that were *not* identified in the Court's June 17, 2011 order. The defendants have argued in this case the applicability of a three part test for determining when an accident involving a parked vehicle could give rise to benefits under Michigan's no fault act. *See e.g. Putkamer v Transamerica Ins Co*, 454 Mich 626, 635-636; 563 NW2d 683 (1997); *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 216-219; 580 NW2d 924 (1998). This three part test calls first for a determination of whether the case fits within one of the exceptions found in MCL 500.3106 to the general rule against recovery of no fault benefits where a parked vehicle is involved. In addition, this three part test requires independent proof that the plaintiff's injury arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. Finally, *Putkamer* and related cases have required proof that the injury had a causal relationship to the parked vehicle that is more than fortuitous. A substantial percentage of the application for leave to appeal that Allstate filed is addressed to the latter two prongs of this three part test. Plaintiff has responded to these arguments by noting that the three part test propounded in such cases as *Putkamer* cannot be harmonized with the unequivocal language of MCL 500.3106, and that the sole issue which is to be addressed in any case involving a parked vehicle is whether the accident in question falls within one of the exceptions found in §3106(1). Plaintiff's Response to Application for Leave, pp. 8-12. It is June 17, 2011 order, the Court has asked for supplemental briefing only on the question of whether Ms. Frazier's injury fell within any of the exceptions specified in §3106(1); the Court has not asked for supplemental briefing on the question of whether Ms. Frazier's injury arose out of the ownership, operation or use of a motor vehicle as a motor vehicle. Nor has the Court asked for briefing on the question of the causal relationship between the parked vehicle and Ms. Frazier's injuries. To the extent that these additional aspects of the three part test set out in *Putkamer* remain as issues in this case, plaintiff will rely on her response to the application for leave to appeal which she has already filed.

The Court further invited the parties to submit supplemental briefs addressed to these issues. This brief is being submitted in response to the Court's June 17, 2011 order.

## I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT MS. FRAZIER'S INJURY WAS A DIRECT RESULT OF PHYSICAL CONTACT WITH EQUIPMENT PERMANENTLY MOUNTED ON THE VEHICLE.

The first issue that the Court is to consider is whether this case falls within the language of MCL 500.3106(1)(b), the provision of the parked vehicle provision of the no fault act pertaining to an injury that was "a direct result of physical contact with equipment permanently mounted on the vehicle . . ."

Allstate insists in its application for leave that the door of a car does constitute equipment for purposes of §3106(1)(b), The word "equipment" is not defined in the no fault act. This Court has on numerous occasions resorted to dictionary definitions "to give words their common and ordinary meaning." *Krohn v Home Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011); *Brackett v Focus Hope, Inc.*, 482 Mich 269, 276; 753 NW2d 207 (2008). As detailed in plaintiff's original response to Allstate's application for leave, the word "equipment" is without question sufficiently broad to encompass the door of a car.

Allstate argued in its application that the word "equipment" as used in MCL 500.3106(1)(b) must be construed as different from the word "vehicle." Defendant's Application, pp. 18-19. The point of this argument appears to be that a car door in an intrinsic part of a vehicle and, in defendant's view, may not be considered "equipment." The obvious problem with the distinction that Allstate proposes is that, no matter how one slices it, a car door is *not* a vehicle. It may be characterized as a component of a vehicle. It may also be described as equipment on a vehicle. But

it can hardly be described as a "vehicle." Thus, if one applies defendant's proposed dichotomy between "equipment" and "vehicle," since a door is most certainly not a "vehicle," it should follow under Allstate's logic that a car's door must represent precisely what §3106(1)(b) addresses - equipment.

There is, however, another flaw in defendant's reasoning. MCL 500.3106(1)(b) requires the "equipment" be permanently mounted. Since any "equipment" covered by §3106(1)(b) must be permanent in character, it is hard to understand how such "equipment" does not become - like a door - an essential part of that vehicle. Allstate would have this Court accept the view that the concept of equipment "is something in addition to the vehicle itself." Defendant's Application, p. 19. There is nothing in the text of §3106(1)(b) that would limit the word "equipment" to something that is "added" to a vehicle at some unspecified point in time after it was manufactured. A car door is equipment that is permanently mounted on a vehicle. It makes no difference for purposes of §3106(1)(b) whether that door was mounted on the vehicle at the time it was originally manufactured or whether it was equipment added to the vehicle at a later time. It is still equipment permanently mounted.

The definition of "equipment permanently mounted" adopted by the Court of Appeals majority in this case is entirely consistent with the rare Michigan statutes that have actually provided a statutory definition of the word "equipment." The Natural Resources and Environmental Protection Act, MCL 324.101, *et seq*, contains several provisions in which this word is defined. One of these provisions is MCL 324.44501, a section of the act pertaining to charter and livery boats. MCL 324.44501(i) defines "equipment" as follows:

"Equipment" means *a system, part, or component of a vessel as originally*

*manufactured*, or a system, part or component manufactured or sold for replacement, repair, or improvement of a system, part, or component of a vessel; an accessory or equipment for, or appurtenance to, a vessel; or a marine safety article, accessory, or equipment intended for use by a person on board a vessel; but does not include radio equipment.

*Id.* (emphasis added).

MCL 324.44501(i) demonstrates that the word "equipment" is broad enough to describe both an original component of a conveyance as well as something added to it later.[2] While plaintiff does not suggest that the definition of "equipment" found in a section of the Natural Resources Act is to be applied to §3106(1), *see Woodard v Custer*, 476 Mich 545, 563; 719 NW2d 842 (2006). MCR 324.44501(i) demonstrates that, contrary to the argument made by Allstate in its application for leave, the word "equipment" can properly cover a component of a vessel at the time it was originally manufactured. Precisely the same conclusion should be reached in applying §3106(1)(b).

MCL 500.3106(1)(b) also requires that the injury be the "direct result of physical contact"

---

[2]This same point can be demonstrated in another provision of the Natural Resources and Environmental Protection Act. The subchapter of that act addressed to water and marine safety contains the following definition:

"Associated equipment" means any of the following that are not radio equipment:

(i) *An original system, part, or component of a boat at the time that boat was manufactured, or a similar part or component manufactured or sold for replacement.*

(ii) Repair or improvement of an original or replacement system, part, or component.

(iii) An accessory or equipment for, or appurtenance to, a boat.

(iv) A marine safety article, accessory, or equipment intended for use by a person on board a boat.

MCL 324.80101(c) (emphasis added).

with the equipment "while the equipment was being operated or used." There is no doubt that Ms. Frazier was using the door at the time of her fall. Moreover, the evidence at trial created an issue of fact on the question of whether her fall was the direct result of contact with the door. Ms. Frazier testified at trial that she had her left hand on the door of her car, preparing to close it. Ms. Frazier had to move out of the way to allow the door to swing closed. As she did so, she fell. *Id.* Tr. Vol. 4, pp. 96-98. In its final instructions to the jury, the trial court read to the jury the actual language of §3106(1)(b). Tr. Vol. 5, p. 143. The evidence presented in this case supported the jury's determination that Ms. Frazier's injury occurred as a direct result of contact with the door.

## II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT MS. FRAZIER'S INJURY OCCURRED WHILE SHE WAS IN THE PROCESS OF ALIGHTING FROM HER VEHICLE.

The Court has also requested briefing on the question of whether Ms. Frazier's injury occurred while she was in the process of alighting from her vehicle under §3106(1)(c). In her response to Allstate's application for leave, Ms. Frazier discussed the Michigan case law pertaining to this section of the no fault act. This brief will address the law from outside Michigan pertaining to the appropriate interpretation of the term "while alighting."

There is a substantial body of case law from around the country on this subject. *See generally* Annotation, *What constitutes "entering" or "alighting" from vehicle within meaning of insurance policy or statute mandating insurance.* 59 ALR 4th 149. The reason that this body of law exists is because many insurance companies made use of the term "while alighting" in describing the scope of coverage.[3] Moreover, the word "alighting" is one of the terms used in section 1(a)(6)

[3]This fact is demonstrated in the numerous Michigan cases predating the no fault act which involved insurance policies which provided coverage while the insured was "occupying" a vehicle. These policies further defined the word "occupying" as including alighting from the

of the Uniform Motor Vehicle Reparations Act to define a critical term, "use of a motor vehicle," employed in that uniform act.

It is impossible to harmonize all of the cases from around the country construing the phrase "while alighting". Several courts have concluded that "no general rule of interpretation can be formulated" and, therefore, "the facts of each case determine the result." *St. Paul Indemnity Co v Broyles*, 230 Miss 45; 92 So2d 252, 254 (1957); *Tyler v Ins Co. of North America*, 331 So2d 641, 645 (1976). These courts have left the determination of the scope of the term "while alighting" for the trier of fact.

Other courts have adopted a test of the term "while alighting" that is aptly described in 8A Couch on Insurance, 3rd ed, §121:88:

> The word "while," as used in the phrase "while alighting," refers to some continuity of action by the insured, and to the time during which, or as long as, the alighting takes place. Consequently, a person is not in the process of "alighting" within a policy providing medical services recovery for persons sustaining bodily injury caused by accident "while in or upon, entering or alighting" from an automobile, if *at the time of the injury he or she has completed all the acts normally performed by the average person in getting out of an automobile under similar conditions* and if he or she has embarked upon a course of conduct entirely distinct from that reasonably necessary to make an exit from the car.
>
> *Id* (emphasis added).

As this section of the Couch treatise indicates, the phrase "while alighting" connotes a sequence of actions performed by a person during the process of getting out of a vehicle. *Broyles,* 92 So2d at 254. A number of courts outside Michigan have held that this continuity of action associated with alighting from the vehicle extends to any point at which the injured party retains

---

vehicle. *See Nickerson v Citizens Mutual Ins Co*, 393 Mich 324; 224 NW2d 896 (1975); *Bonney v Citizens Mutual Auto Ins Co*, 333 Mich 435; 57 NW2d 321 (1952); *Collins v Motorists Mutual Ins Co*, 36 Mich App 424; 194 NW2d 148 (1971).

physical contact with the vehicle. *See e.g. Whitmire v Nationwide Mut Ins Co*, 254 SC 184; 174 SE2d 391, 394 (1970); *cf Wolf v American Casualty Co of Reading*, 2 Ill App 2d 124; 118 NE2d 777 (1954); *McAbee v Nationwide Mutual Ins Co*, 249 SC 96; 152 SE2d 731 (1967). Obviously, if this contact requirement were to be applied in this case, the jury's verdict in this case in favor of Ms. Frazier would have to be sustained. The evidence presented at trial established that Ms. Frazier had her left hand on the vehicle's door preparing to close it at the time she fell. Tr. Vol 4, p. 19.

Other courts, however, have rejected the view that contact with the vehicle is the determining factor in deciding when the process of alighting from a vehicle has ended. These courts have adopted a more functional approach to the question of the extent of the alighting process. This approach is reflected in the Idaho Supreme Court's decision in *Stoddard v 'AID' Insurance Co*, 57 Idaho 508; 547 P2d 1113 (1976):

> There exists a wide spectrum of decisions construing identical or similar policy provisions. The import of those decisions appears to be that an insured is not held to be an 'occupant' in the terms of 'alighting from' the vehicle *if he has completed all acts normally performed under similar circumstances and has embarked upon an entirely distinct course of conduct.* Correlatively, if the insured has not completed all acts that could reasonably be expected from one in a similar situation and has not embarked on a course of conduct entirely different from that reasonably necessary to make an exit from his car, he is construed to be still in the process of 'alighting from' the car.
>
> 547 P2d at 1115 (emphasis added).

The test adopted in *Stoddard* has been repeated in comparable language in other cases. For example, the Court in *Carta v Providence Washington Indemnity Co*, 143 Conn 372; 122 A2d 734, 737 (1956) described the extent of the alighting process in the negative: "A person is not in the process of alighting if, at the time, he has completed all acts normally performed by the average person in getting out of an automobile under similar conditions . . ."). *See also Edwards v Mutual of Omaha*

*Ins Co*, 530 A2d 1190, 1193 (DC App 1987); *Whitmire*, 174 SE2d at 394 (occupant of vehicle is in the process of alighting when he "is still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions).

These cases, therefore, stand for the proposition that the alighting process is not finished until the injured party completes all of the actions reasonably necessary to exit the vehicle. Assuming that this test of alighting is used, the Court of Appeals properly concluded in this case that Ms. Frazier was in the process of exiting her vehicle when she fell. Since one of the essential, routine acts associated with exiting a vehicle is closing that vehicle's door, Ms. Frazier had not yet "completed all acts normally performed by the average person in getting out of an automobile." *Carta*, 122 A2d at 737.

There is wide variance in the case law as to how far the process of alighting extends, *i.e.*, when "acts normally performed by the average person in getting out of a vehicle" have been completed. Some courts have held that the phrase "while alighting" encompasses actions taken by a party after getting out of a vehicle and walking some distance from it. *See e.g. Whitmire*, 174 SE2d at 395-396; *Nelson v Iowa Mutual Ins Co*, 163 Mont 82; 115 P2d 362 (1973); *State Farm v Holmes*, 175 Ga App 655; 333 SE2d 917, 918 (1985); *Joins v Bonner*, 28 Ohio St3d 398; 504 NE2d 61 (1986); *Sentry Ins Co v Providence Washington Ins Co*, 91 Wis2d 457; 283 NW2d 455 (Wis App 1979); *Broyles,* 90 So2d at 49-50; *State Farm Mut Auto Ins Co v Levinson*, 438 NW2d 110, 114 (Minn App 1989); *Day v Coca-Cola Bottling Co., Inc.*, 420 So2d 518, 519 (La App 1982); *Kentucky Farm Bureau Mutual Ins Co v McKinney*, 831 SW2d 164 (Ky 1992).

In contrast to these cases that have expansively viewed the scope of this alighting process, there are other decisions which have held that a party who leaves a vehicle and walks away from or

around that vehicle is no longer alighting. *See e.g. Kelleher v American Mutual Ins Co of Boston*, 32 Mass App Ct 501; 590 NE2d 1178, 1180-1181 (1992); *Fidelity & Casualty Company of New York v Garcia*, 368 So2d 1313, 1315 (Fla App 1979) (plaintiff crossing a road after exiting her vehicles is no longer alighting); *Christiansen v General Accident Ins*, 482 NW2d 510 (Minn App 1992) (plaintiff who left vehicle and falls as she is walking toward the front of the car is no longer alighting); *Miera v State Farm Mutual Auto Ins Co*, 135 NM 574; 92 P2d 20, 22 (2004); *Chamblee v State Farm Mutual Auto Ins Co*, 01 So2d 922 (Ala 1992); *Marcillonis v Farmers Ins Co of Oregon*, 318 Or 640; 871 P2d 470, 471 (1994).

Under the facts of this case this Court need not decide which of those decisions should provide guidance herein. Each of these cases is distinguishable from Ms. Frazier's case in that each involves a person who has exited the vehicle and walked some distance away from the vehicle is fundamentally different in that Ms. Frazier had not yet walked away from the vehicle at the time she fell. Rather, she fell as she was standing outside her vehicle and had to change her position slightly to close the vehicle's door. Thus, she was still involved in the process of exiting the vehicle since she was closing the door at the time she suffered her injury.[4] *State Farm Mutual Auto Ins Co v Berg*, 70 Or App 410; 689 P2d 959, 963 (1984).

---

[4]It is worth noting that even those cases that have refused to extend the process of alighting to a situation in which the plaintiff moved some distance from the vehicle contain language fully supporting Ms. Frazier's position herein. For example, in *Miera* the New Mexico court arrived at the conclusion that the plaintiff had completed the alighting process, noting that "[t]here was no connection between [plaintiff's injury] and his occupation of the [vehicle]." 92 P2d at 22. The same cannot be said of this case. Here there was a direct connection between Ms. Frazier's actions at the time she fell and her occupancy of the vehicle. Similarly, the court in *Garcia* held that the injured party had completed the alighting process because she "was engaged in a distinctly separate activity having nothing to do with the truck." 368 So2d at 1315. Once again, in this case Ms. Frazier was at the time she sustained her injury engaged in an activity that had everything to do with her vehicle; she was closing its door before her drive to work.

Plaintiff has not been able to locate a single case that holds that a person who is injured while closing a car's door is *not* engaged in the alighting process. There are, however, a number of cases that have held either expressly or impliedly that the closing of a vehicle's door must be construed as part of the alighting process. Thus, the Connecticut Supreme Court in *Carta* stated with respect to an insurance policy that extended coverage to an insured who was injured "while . . . alighting from" the vehicle:

> It is not reasonable to believe that the parties intended the coverage to end for one who gets both feet on the ground after emerging from the vehicle and, while then in the act, let us say, of closing the door is struck by a passing automobile. Some reasonable length of time must be allowed a person, after getting out, for the completion of acts which can reasonably be expected from those in similar situations.
>
> 122 A2d at 736.

In *State Farm Mut Auto Ins Co v Levinson*, 438 NW2d 110 (Minn App 1989), the Court concluded that a factual issue remained on whether a child was alighting from a vehicle at the time she was injured, citing to the fact that the evidence "showed that the door was ajar and it could be inferred that [the child] was closing the door when she was struck."; *cf Young v Allstate Ins Co*, 120 Md App 216; 706 A2d 650, 659 (1998) (holding that plaintiff was no longer getting out of a vehicle when he had exited the vehicle, closed the door and walked to the rear of the vehicle.); *Stoddard*, 547 P2d at 1116 (holding that plaintiff was alighting from the vehicle, accenting the fact that "he left . . . packages and articles of clothing in the car and also failed to closed the door; *cf Kelleher v American Mutual Ins Co*, 32 Mass App Ct 501; 590 NE2d 1178, 1179 (1992) (concluding that plaintiff was no longer in the process of alighting when he left the car, closed and locked the door and began walking across the street); *cf Marsh v Hogeboom*, 167 Kan 349; 205 P2d 1190 (1949).

There are, therefore, a number of strands of out-of-state law construing the phrase "while

alighting." However, not one of the approaches employed in these other states supports the view advocated by Allstate herein.

In determining the scope of the term "while alighting" as it applies to the facts of this case, the Court must also take note of the context in which this term is used. *Manuel v Gill*, 481 Mich 637, 649-650; 753 NW2d 48 (2008); *Allison v AEW Capital Management, LLP*, 481 Mich 419, 432; 751 NW2d 8 (2008). The whole point of the exceptions set out in §3106(1)(a), (b) and (c) is to describe those limited situations in which an injury arises out of "the ownership, operation, maintenance or use of a parked vehicle as a motor vehicle." Here, Ms. Frazier was preparing to drive her vehicle to her job. Before she could do so, it was absolutely essential that, after placing some items in the vehicle, she close the door of that vehicle. Under the facts of this case, where Ms. Frazier was incapable of driving her vehicle until she closed the door, her actions at the time she fell must be associated with the operation of her vehicle.

The context of the "while alighting" language in §3106(1)(c) is important in one other respect. MCL 500.3106(1)(c) described three processes that allow for the payment of no fault benefits where a parked vehicle is involved: occupying, entering into and alighting from. It is logical to conclude that the latter two phrases - entering into and alighting from - are meant to describe the opposite actions associated with getting into and out of a car.

Viewed in this way, it is appropriate to examine the application of §3106(1)(b)'s "entering into" provision if facts comparable to Ms. Frazier's case existed. Assume that a person was preparing to drive her car. That person unlocks the car door, opens the door and, as the door swings open, the person has to move her feet to avoid being struck by the door. If, while moving to avoid the arc of the door, the person were to slip and fall and suffer injury, it would be obvious that this

injury occurred while she was in the process of "entering into" the vehicle. Since it is clear that the activity that is the statutory opposite of "while alighting" - entering would fall within §3106(1)(c) under comparable facts, the same should be true of Ms. Frazier's injuries here.

Allstate has also claimed in its application for leave that Ms. Frazier could not have been in the process of alighting from the vehicle because she never occupied it. However, this Court has held in construing comparable language in MCL 500.3111, which provides for no fault benefits to the occupant of a vehicle involved in an out-of-state accident, that "[a] person must be *physically inside* a vehicle to be an "occupant" of it under the no fault act." *Rednour v Hastings Mutual Ins Co,* 468 Mich 241, 249; 661 NW2d 562 (2003) (emphasis in original). There is no question that, prior to her fall, Ms. Frazier was physically inside her vehicle when she reached in it to place certain items in it, including a cup of coffee into the cup holder between the two front seats. There is also no question that, had Ms. Frazier been injured as she was physically in her parked vehicle, that injury would have been within the "while occupying" language of §3106(1)(c).

## III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT MS. FRAZIER WAS ENTITLED TO AN AWARD OF ATTORNEY FEES UNDER MCL 500.3148(1).

The third issue on which the Court has requested additional briefing is on the question of whether Ms. Frazier was entitled to an award of attorney fees. The source of such an award is MCL 500.3148(1), which provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.
>
> *Id.*

The Court of Appeals ruled in its December 21, 2010 opinion that Ms. Frazier could recover attorney fees under this provision. The Court was correct in reaching this conclusion.

Following her December 30, 2005 accident, Ms. Frazier reported it to her insurer. On January 5, 2006, she provided a statement to an Allstate representative which was recorded. Attached hereto as Exhibit A is a copy of a transcript of the statement. Ms. Frazier described in that statement how her injury occurred. She explained that, after placing into her vehicle a number of items that she had been carrying, "I turned and then took my left hand to shut the door and the next thing I knew, I was on the ground." Statement (Exhibit A), p. 4.

Allstate began paying no fault benefits to Ms. Frazier. Vol. 1, pp. 137-139. Allstate acknowledged that if Ms. Frazier's fall occurred as she had described, it was responsible for paying these benefits were payable. This point was later confirmed at trial by another agent of Allstate, Jill Conkey. *Id.*, p. 150. Under Allstate's internal policies, Ms. Frazier's slip and fall claim was automatically assigned to a special investigation unit. *Id.*, pp. 136-137. The adjuster assigned to Ms. Frazier's claim was Trish Dzierwa. Attached hereto as Exhibit B are diary notes made by Ms. Dzierwa, representing the record of her investigation of Ms. Frazier's claim.

These diary notes reflect that Ms. Dzierwa set up a meeting with the two paramedics who were dispatched to provide treatment to Ms. Frazier on December 30, 2005, Michael Fitzsimmons and Darrell Blalock. Ms. Dzierwa's diary note for April 5, 2006 indicates that a meeting had been set up with the two paramedics and that no recording was to be made of this meeting. Diary Notes (Exhibit B), p. 2.

The diary also reflects that Ms. Dzierwa met with the two paramedics on April 6, 2006. According to the notes that Ms. Dzierwa made of her conversations with Mr. Fitzsimmons and Mr.

Blalock, the two paramedics told her that Ms. Frazier "was nowhere near a motor vehicle when she fell. In fact, she was laying on the parking lot outside of the car port. There was a walkway next to the carport and there was some ice there, but she was found just outside that ice at the very corner of the car port - not next to a vehicle." *Id.* Thus, Ms. Dzierwa recorded in her notes that "the EMS did not find [Ms. Frazier] laying next to a vehicle." *Id.*

In a later entry in her diary, Ms. Dzierwa wrote that her conversation with the paramedics revealed that Ms. Frazier "was found on the parking lot, not under the car port and nowhere near a vehicle. There was not a vehicle even parked in the first available parking spot. In fact, [Ms. Frazier] was in a walkway at the edge of the car port when they found her." *Id.*, p. 3.

Approximately one week after Ms. Dzierwa had her conversation with the paramedics, she signed a letter which was mailed to Ms. Frazier, advising her that Allstate had "carefully reviewed the facts" associated with the December 30, 2005 accident. Vol. 4, p. 38. Ms. Dzierwa's letter proceeded to advise Ms. Frazier that her claim for no fault benefits had been denied because "you have made representations regarding issues material to the loss in question," and for "failing to testify truthfully as to your knowledge of the facts and circumstances connected with this loss. . ." *Id.*, p. 39.

After Allstate ceased making payments to Ms. Frazier she instituted this action in September 2006. During the discovery phase of the case, the depositions of Mr. Fitzsimmons and Mr. Blalock were taken. In these depositions, the two were shown pictures of the car port and parking lot where Ms. Frazier fell. Copies of these pictures are attached hereto as Exhibit C. On these pictures, Ms. Fitzsimmons and Mr. Blalock identified where Ms. Frazier was laying when they found her on December 30, 2005. Contrary to what was recorded in Ms. Dziera's diary notes, Mr. Fitzsimmons

testified in his deposition that it was possible that Ms. Frazier had fallen by her car door.

At the December 2008 trial conducted on Ms. Frazier's claim, Allstate's defense was comparable to its rationale for originally denying Ms. Frazier's request for benefits - that Ms. Frazier's fall did not occur as she had described it because she fell some distance away from her vehicle.

In her trial testimony, Ms. Frazier described her accident in a manner entirely consistent with the description that she had provided to Allstate's representative in a recorded interview given only days after her accident. *See* Statement (Exhibit A). Ms. Frazier testified that she opened the truck's door to deposit items into the vehicle's front seat. After doing so, she leaned out of the truck and moved her feet slightly so that she could close the door. As she did so, she fell. Vol. 4, pp. 17-20.

At trial Ms. Frazier was shown the photographs that had been marked as exhibits at the depositions of Mr. Fitzsimmons and Mr. Blalock. Ms. Frazier testified that the two paramedics had accurately identified where she was laying after her fall. Vol. 4, pp. 23-24.

The two paramedics who treated Ms. Frazier on December 30, 2005 also testified at trial. Mr. Fitzsimmons recalled that there was a vehicle parked in the parking space in the car port nearest to where Ms. Frazier was laying. Vol. 5, p. 33. He acknowledged that he met with Ms. Dzierwa, Allstate's adjuster, but he denied telling her during their conversation that there was no car parked in that spot. *Id.*, pp. 34-35.

Mr. Fitzsimmons further testified that he did not tell Ms. Dzierwa that Ms. Frazier was found in a walkway. *Id.*, p. 37. Thus, Mr. Fitzsimmons indicated that, to the extent that Ms. Dzierwa's diary notes reflected that the paramedics reported finding Ms. Frazier in a walkway, that entry was not accurate. *Id.*

Similarly, Mr. Fitzsimmons disagreed with any suggestion that he found Ms. Frazier in the middle of the parking lot when he arrived at the scene on December 30, 2005. *Id.*, p. 41. Instead, he estimated at trial that Ms. Frazier was laying only three to six feet from the pole of the car port when he arrived. *Id.*, p. 43. And, he acknowledged that, based on her positioning, Ms. Frazier may have fallen while closing the door of her truck. *Id.*, p. 40.

The second paramedic who treated Ms. Frazier, Mr. Blalock, acknowledged that he did not know precisely where Ms. Frazier fell. *Id.*, pp. 56, 61. He testified that Ms. Frazier was found at the end of the walkway, where it goes into the parking lot area. Mr. Blalock testified that he did not remember a car parked in Ms. Frazier's assigned space, but added, "I'm not saying there wasn't. I'm saying I don't remember there being a car in that parking lot." *Id.*, p. 61. Mr. Blalock did not recall telling Ms. Dzierwa that there was no car parked in Ms. Frazier's spot, *id.*, p. 60, but he indicated there was no car where Ms. Frazier was laying. *Id.*, pp. 60, 62. Mr. Blalock confirmed where Ms. Frazier was laying in the photograph which was an exhibit in his deposition. Photo (Exhibit C), p. 2. He identified this area as five to six feet from the car port post. *Id.*, p. 68.

The general law applicable to claims for attorney fees under §3148(1) was the subject of this Court's decision in *Ross v Auto Club Group*, 481 Mich 1; 748 NW2d 552 (2008). In that case the Court held:

> The purpose of the no-fault act's attorney-fee penalty provision is to ensure prompt payment to the insured. Accordingly, an insurer's refusal or delay places a burden on the insurer to justify its refusal or delay. The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty.
>
> The trial court correctly set forth this rule of law in determining that plaintiff was entitled to attorney fees. The issue is whether it clearly erred in applying this rule and finding that defendant's refusal was not based on a legitimate question of statutory

> construction, constitutional law, or factual uncertainty. The determinative factor in our inquiry is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable.

*Id.*, p. 11.

Several aspects of the law as set out in *Ross* are important here. First, the burden is on the insurer to justify its refusal to pay benefits. *Ross* indicates that an insurer can meet its burden by demonstrating that its failure to pay benefits resulted from "a legitimate question of statutory construction or factual uncertainty." 481 Mich at 11. However, in undertaking this analysis, a court must focus its attention of the reasonableness of the insurer's initial decision refusing to pay such benefits. *Ross,* 481 Mich at 11; *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 635; 552 NW2d 671 (1996); *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 105; 527 NW2d 524 (1994). Thus, Ms. Frazier's right to recover attorney fees under §3148(1) must be determined on the basis of the information actually available to the defendant's agents as of April 2006, when Allstate made the decision to terminate Ms. Frazier's benefits. As the Court of Appeals recognized, piecing together what the defendant's agents knew as of that date and the rationale offered for terminating Ms. Frazier's benefits leads to the conclusion that the Court of Appeals was correct in granting Ms. Frazier's request for attorney fees under §3148(1).

In January 2006, long before Ms. Frazier had retained an attorney to represent her, she was asked by her insurer to provide a recorded statement describing how the accident occurred. Statement (Exhibit A). Ms. Frazier complied with Allstate's request and gave a statement on January 5, 2006. Vol. 1, p. 137. In that statement, Ms. Frazier indicated that she walked to her truck and placed several items into the front seat of the vehicle. She then moved her feet so that she could close the truck's door and as she did so, she slipped and fell. Statement (Exhibit __), p. 4. For

purposes of her request for attorney fees under §3148(1), there are two things of import in the recorded statement that Ms. Frazier supplied only days after the accident.

First, the description of the accident that Ms. Frazier provided to Allstate's representative in January 2006 proved to be virtually identical to the events that she described nearly three years later when she testified under oath at trial. The second notable thing about the statement that Ms. Frazier provided to Allstate in January 2006 is that this statement did not prompt Allstate to cut off no-fault benefits to Ms. Frazier. To the contrary, when this statement was given, Allstate reacted by paying Ms. Frazier's no fault benefits. Allstate's payment of Ms. Frazier's benefits in the face of her January 2006 recorded statement confirms the fact that, if the accident occurred in the way that Ms. Frazier described it (both in her January 2006 recorded statement and her trial testimony), Allstate was compelled to pay her no fault benefits.[5]

Obviously, Allstate later changed its position and cut-off further payments to Ms. Frazier. Its agent, Ms. Dzierwa, was responsible for that decision. While Ms. Dzierwa did not testify at trial, her diary notes were introduced. *See* Exhibit B. These notes described the motivation behind Allstate's decision not to pay any further benefits to Ms. Frazier. Ms. Dzierwa's notes documented that in April 2006 she set up a meeting with Michael Fitzsimmons and Darrell Blalock, the two

---

[5]Allstate argues that, even if one accepts Ms. Frazier's version of how she fell, there was still a question of whether her injury was one that came within the parked vehicle provision of the no fault act, MCL 500.3106. This argument, however, is not available to the defendant in light of Allstate's response to Ms. Frazier's January 2006 recorded statement. As noted previously, to determine if Allstate acted unreasonably in denying Ms. Frazier's claim, the Court must confine itself only to the question of whether "its initial refusal to pay was unreasonable." *Ross*, 481 Mich at 11; *Moore v Secura Ins*, 482 Mich 507, 522; 759 NW2d 833 (2008). By its own actions in paying Ms. Frazier's benefits after she gave her recorded statement, Allstate has confirmed that it did not refuse to pay these benefits because of a dispute over the scope of MCL 500.3106.

paramedics dispatched in response to Ms. Frazier's 911 call. Diary (Exhibit C), p. 2. Ms. Dzierwa met with both men on April 6, 2006.[6] *Id.*

According to Ms. Dzierwa's notes, her conversations with the two paramedics led her to the conclusion that Ms. Frazier could not have been injured in the way that she described it. Ms. Dzierwa reached this determination solely on the basis of where the paramedics purportedly found Ms. Frazier on December 30, 2005. According to Ms. Dzierwa's notes of her meeting, Mr. Fitzsimmons and Mr. Blalock drew a diagram for her on a sheet of paper, "which would indicate that [Ms. Frazier] was nowhere near a motor vehicle when she fell." *Id.*

This portion of Ms. Dzierwa's conversation with the two paramedics is of note because sometime later in their sworn depositions and their trial testimony, the two men were shown photos of the car port where Ms. Frazier's vehicle was parked and both marked on those photos their recollection of where Ms. Frazier was laying when they arrived. *See* Exhibit __. The two men were to later estimate at trial that the spot that they identified was only three to six feet (Fitzsimmons) or five to six feet (Blalock) from the post of the car port. Vol. 5, pp. 42, 68. Moreover, at trial, Ms. Frazier testified that she was in agreement with Mr. Fitzsimmons and Mr. Blalock in their recollection as to where the two paramedics found her. Vol. 4, pp. 23-24.

Ms. Frazier did not disagree with the two paramedics on this issue because her car was parked in the parking space closest to the spot identified by the two men. Ms. Dzierwa's notes, however, indicated that this could not have been so because, as she recorded, "there was not a

---

[6]The precise nature of the conversation(s) that took place between Ms. Dzierwa and the two paramedics is unknown. Her diary notes indicate that, prior to their meeting, a decision was made that there would be "no recording at this time" of any interview with the paramedics. Diary (Exhibit B), p. 2.

vehicle even parked in the first available parking spot." Diary (Exhibit B), p. 3.

This aspect of Ms. Dzierwa's notes of her meeting with the two paramedics does not comport with the trial testimony given by either of the two paramedics. Mr. Fitzsimmons testified that there *was* a car parked in that first space when he arrived on December 30, 2005, and that he never would have told Ms. Dzierwa the opposite. Vol. 5, pp. 32-35. Mr. Blalock, testified at trial that he was not sure if Ms. Frazier's vehicle was parked in its assigned space. He testified, "I could not say for sure if there was a car in that parking spot." Vol. 5, p. 60.

Ms. Dzierwa's notes of her conversation with Mr. Fitzsimmons and Mr. Blalock further indicated that Ms. Frazier "was in a walkway at the edge of the car port when the found her." Thus, Ms. Dzierwa recorded that the two paramedics whom she interviewed identified Ms. Frazier as laying in the walkway. Yet both of the paramedics denied that Ms. Frazier was in the walkway when they arrived. Vol. 5, pp. 36-37, 57.

What Ms. Dzierwa did in this case was to take a recorded statement from Ms. Frazier after which she conducted an interview of the two paramedics, which she deliberately did not record. On the basis of that interview, Ms. Dzierwa came to the conclusion that Ms. Frazier's version of how she sustained her injury was a fabrication based solely on the paramedics' recollection of where Ms. Frazier was laying when the two arrived. And, Ms. Dzierwa came to this conclusion despite the fact that one of these two paramedics testified at trial that, based on where Ms. Frazier was laying, it was possible to conclude that she fell while closing her car door. Vol. 5, p. 40.

What the record in this case reflects, therefore, is that Ms. Dzierwa either distorted the information provided to her by Mr. Fitzsimmons and Mr. Blalock, failed to ask the pertinent questions of these two paramedics or merely sifted the facts which the two provided to her,

extracting only those statements that might be used to call Ms. Frazier's description of the incident into question. What the record also reflects is that, after interviewing the two paramedics, Ms. Dzierwa conducted no further investigation. Less than a week after meeting with the two, she wrote a letter informing Ms. Frazier that her claim was being denied purportedly because plaintiff made material misrepresentations in reporting her claim. Vol. 4, pp. 38-39.

The Court of Appeals in its December 21, 2010 opinion examined in detail the facts pertinent to Ms. Frazier's attorney fee request. Opinion (Defendant's Application Exhibit A), pp. 8-12. After reviewing these facts, the Court ruled that an award of fees was appropriate under §3148 for the following reasons:

> In light of these circumstances we cannot agree with the trial court that defendant's initial discontinuation of plaintiff's no-fault benefits was reasonable. The "investigation" of plaintiff's claim was perfunctory and it was neither completely nor accurately documented; thus, it led to unsupported conclusions to plaintiff's detriment. The goal of the no-fault insurance system is "to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers v. Attorney General,* 402 Mich. 554, 578-579; 267 NW2d 72 (1978). This goal is completely defeated when an insurer, through its representatives, is permitted to deny such victims their important contractual and statutory rights merely on the ground that a half-hearted and shoddy "investigation" led to contrary and unfounded conclusions-to the insurer's benefit-about the facts underlying a claim. When reasonable and reliable investigatory methods and practices are employed, a reasonable decision to deny benefits because of a legitimate question of factual uncertainty can exist. In this case, however, we conclude that a reasonable investigation was not conducted prior to the denial of plaintiff's claim for no-fault benefits. Any factual uncertainty that initially existed was created by-not uncovered by-Dzierwa's "investigation," as evidenced by the clear, repeated, and contrary testimony of the EMS technicians involved in this matter. The artificial creation of factual uncertainty through such "investigatory" methods and practices should be neither encouraged nor rewarded. As a consequence of defendant's actions, plaintiff was forced to endure severe economic hardship and engage in extensive and time-consuming litigation to pursue her rights. Because defendant's denial of plaintiff's no-fault benefits was not initially based on a legitimate question of factual uncertainty, the trial court's denial of plaintiff's request for attorney fees pursuant to MCL 500.3148(1) is reversed.

*Id.*, p. 12.

The Court of Appeals conclusion was correct. MCL 500.3148(1) requires a determination of whether Allstate's April 2006 decision to terminate payments to Ms. Frazier was unreasonable. Allstate successfully argued in the circuit court that its decision terminating Ms. Frazier's benefits was not unreasonable because a factual dispute existed over where Ms. Frazier fell. However, the factual dispute must be *bona fide*. *See Gobler v Auto Owners Ins Co*, 428 Mich 51, 67; 404 NW2d 199 (1987). The reasons offered by Ms. Dzierwa for Allstate's initial decision to deny benefits to Ms. Frazier do not withstand analysis.

## RELIEF REQUESTED

Based on the foregoing, and for the additional reasons discussed in the previously filed response to defendant's application for leave to appeal, plaintiff-appellee, Mona Lisa Frazier, respectfully requests that this Court deny defendants' application for leave to appeal in its entirety.

**MARK GRANZOTTO, P.C.**

**MARK GRANZOTTO (P31492)**
Attorney for Plaintiff-Appellee
225 South Troy Street, Suite 120
Royal Oak, Michigan 48067
(248) 546-4649

**LAW OFFICES OF SAMUEL BERNSTEIN**

**MICHAEL A. WEISSERMAN (P36202)**
**MARK J. BERNSTEIN (P56528)**
Attorney for Plaintiff-Appellee
31100 Northwestern Highway
Farmington Hills, Michigan 48334
(248) 865-0863

Dated: October 18, 2011

RECORDED STATEMENT OF MONA LISA FRAZIER

2172398286 Tape696943-1

--SPEAKING. I AM INTERVIEWING LISA FRAZIER REGARDING A SLIP AND FALL THAT OCCURRED ON DECEMBER THE FIFTH, UM, 2005.

Q. UM, ARE YOU, UM, LISA, ARE YOU AWARE THAT WE ARE RECORDING THIS CONVERSATION?

A. YES.

Q. OKAY. AND DO I HAVE YOUR PERMISSION TO DO SO?

A. YES.

Q. OKAY. CAN YOU PLEASE STATE YOUR FULL NAME, AND SPELL YOUR LAST NAME?

A. MONA LISA FRAZIER F-R-A-Z-I-E-R.

Q. AND WHAT IS YOUR ADDRESS?

A. 67303 VANDYKE, WASHINGTON, MICHIGAN 48095.

Q. OKAY. AND HOW LONG HAVE YOU LIVED AT THAT, UH, RESIDENCE?

A. TWO YEARS.

Q. OKAY. IS THIS AN APARTMENT COMPLEX, OR--

A. IT'S A CONDOMINIUM.

Q. OKAY.

A. IT FORMERLY WAS APARTMENTS BUT THEY (INAUDIBLE) INTO CONDOMINIUMS.

Q. OKAY. IS THERE A SPECIAL NUMBER TO THAT OR JUST, UH, IS THAT YOUR ADDRESS FOR MAILING AND EVERYTHING?

A. RIGHT.

Q. AND THAT IS THE, UM, ADDRESS LISTED ON YOUR DRIVER'S

PLAINTIFF'S EXHIBIT 2

7

A

EXHIBIT

LICENSE?

A. YES.

Q. OKAY. AND, UH, I AM SHOWING THAT THIS OCCURRED ON DECEMBER 30. DO YOU RECALL WHAT DAY OF THE WEEK THAT IS?

A. FRIDAY.

Q. OKAY. AND APPROXIMATELY WHAT TIME OF DAY DID THIS HAPPEN?

A. UH, 5:05--

Q. OKAY. AND--

A. --P.M.

Q. OKAY. WHAT WERE YOU DOING AT THE TIME THIS OCCURRED?

A. I WAS PUTTING MY PURSE, COFFEE MUG AND WORK BAG INTO MY TRUCK.

Q. OKAY. AND WHERE IS YOUR, UH, IS THIS THE, UH, WHAT KIND A VEHICLE ARE WE TALKING ABOUT?

A. 2002 FORD RANGER.

Q. OKAY. AND IS THIS VEHICLE OWNED BY YOU SOLELY?

A. YES.

Q. OKAY. IS THERE ANY LIEN HOLDER ON THAT VEHICLE?

A. NO.

Q. ALL RIGHT. AND, UM, THE REGISTRATION, TITLE AND ALL OF THAT IS--IS IN YOUR NAME?

A. YES.

Q. OKAY. NOW, UM, UH, WHERE WAS THE TRUCK POSITIONED IN

RESPECT TO YOUR HOME?

A. IT WAS--

Q. WAS IT OUT ON THE STREET? WAS IT IN THE DRIVEWAY?

A. IT WAS PULLED INTO MY CARPORT.

Q. OKAY. AND, UM, IS THAT ACROSS THE STREET FROM THE FRONT DOOR OF YOUR HOME OR IS THERE A PARKING LOT THERE, OR--

A. THERE IS--THERE IS A PARKING LOT WHERE THERE ARE SEVERAL CARPORTS.

Q. UM-HUM.

A. AND, UH, AND I WALK DOWN A SIDEWALK--

Q. OKAY.

A. --AND MY CARPORT IS RIGHT (INAUDIBLE) TO THE RIGHT OF THE SIDEWALK--

Q. OKAY.

A. --ONCE YOU COME OFF THE SIDEWALK.

Q. OKAY. AND ABOUT HOW MANY FEET IN FROM YOUR HOME OR YOUR FRONT DOOR WOULD YOU SAY THE (INAUDIBLE) IS, YOU KNOW, AS CLOSE AS YOU CAN--

A. UH, I WOULD (INAUDIBLE) FEET.

Q. OKAY.

A. A HUNDRED FEET.

Q. AND WHAT WERE THE, UM, ROAD AND SIDEWALK AND SO FORTH CONDITIONS LIKE THAT MORNING?

A. I THOUGHT THEY WERE CLEAR--

Q. UM-HUM.

A. --BUT APPARENTLY IT WASN'T.

Q. OKAY.

A. I (INAUDIBLE) SNOW DRIPPING OFF THE CARPORT, IT MUST HAVE FROZE.

Q. OKAY. NOW, UM, YOU SAID YOU WERE PUTTING, UM, YOUR COFFEE MUG AND--AND YOUR WORK THINGS INTO YOUR VEHICLE.

A. RIGHT.

Q. UM, WERE YOU GOING TO GO BACK INTO YOUR HOME AT THAT TI--AT THAT POINT, OR--

A. NO.

Q. OKAY. SO WERE YOU GOING TO GET INTO YOUR VEHICLE OR DID YOU HAVE MORE THINGS TO PUT IN, OR--

A. NO. I--I WAS, UH (INAUDIBLE) IN--IN MY VEHICLE.

Q. OKAY. HOW MANY--WHAT'S THE TOTAL--WHAT DID YOU PUT IN YOUR CAR? DID YOU PUT IT IN THE BACKSEAT OR IN THE FRONT SEAT OR--

A. I PUT IT IN THE FRONT SEAT ON THE PASSENGER SIDE.

Q. OKAY. AND THEN WHA--WERE YOU GONNA DO, WALK AROUND THE CAR TO GET TO THE DRIVER'S SIDE?

A. CORRECT.

Q. ALL RIGHT. SO--OKAY. YOU PUT THE THINGS IN THE FRONT SEAT. THEN WHAT HAPPENS?

A. I TURNED AND THEN TOOK MY LEFT HAND TO SHUT THE DOOR AND THE NEXT THING I KNEW I WAS ON THE GROUND.

Q. OKAY. DO YOU KNOW WHAT CAUSED YOU TO FALL TO THE

GROUND?

A. ICE.

Q. OKAY. AND, UM, LET'S SEE. WHAT HAPPENED WHEN YOU FELL TO THE GROUND?

A. UH--

Q. WERE YOU ABLE TO GET UP, OR--

A. OH, NO. NO.

Q. --WHAT TYPE OF INJURY--WHAT TYPE OF INJURIES DID YOU SUSTAIN?

A. I BROKE MY FOOT.

Q. OKAY. AND IS THAT--IS THAT YOUR RIGHT OR LEFT FOOT?

A. MY RIGHT FOOT.

Q. I'M SORRY, I MISSED THAT, LEFT FOOT?

A. RIGHT FOOT.

Q. RIGHT FOOT, OKAY? I--I APOLOGIZE.

A. THAT'S OKAY.

Q. UM, AND DID THEY HAVE TO DO, UM, NOW, WHEN YOU BROKE YOUR FOOT YOU W--YOU--YOU LAID THERE FOR ABOUT HOW LONG? CAN YOU TELL ME?

A. I'M THINKING FIVE TO TEN MINUTES.

Q. OKAY. AND, UM, HOW DID YOU FINALLY--HOW--HOW ARE YOU ABLE TO FINALLY GET UP?

A. I NEVER DID. I CALLED 911--

Q. OKAY.

A. --AND THEY, UH, CAME AND PUT ME ON A BOARD AND

TRANSPORTED ME TO THE HOSPITAL.

Q. OKAY. AND WHAT HOSPITAL DID THEY TRANSPORT YOU TO?

A. ST. JOSEPH MERCY HOSPITAL.

Q. WHERE ARE THEY LOCATED?

A. UM, 19(INAUDIBLE) HEIGHTS (INAUDIBLE) ROAD.

Q. OKAY. WERE YOU ADMITTED TO THE HOSPITAL?

A. YES.

Q. OKAY. DID THEY HAVE TO DO SURGERY OR WHAT?

A. NO. I SEE THE ORTHOPEDIC DOCTOR ON FRIDAY BECAUSE MY FOOT WAS JUST SO (INAUDIBLE) YOU KNOW (INAUDIBLE) IT.

Q. OKAY.

A. BUT I DO REQUIRE SURGERY THEY'RE TELLING ME.

Q. OKAY. NOW, UM, HOW LONG DID THEY ADMIT YOU FOR?

A. I WAS THERE FROM FRIDAY THE 30TH 'TIL JANUARY 1, IN THE AFTERNOON, SO I WAS THERE TWO AND A HALF DAYS.

Q. AND WHAT WAS THE REASON FOR KEEPING YOU; DO YOU KNOW?

A. UH, PROBABLY 'CAUSE I COULDN'T WALK.

Q. OKAY.

A. (INAUDIBLE).

Q. WERE THEY--WERE THEY DOING, LIKE, A REHAB WITH YOU TO TEACH--TEACH YOU HOW TO DO CRUTCHES OR SOMETHING OR--

A. YES.

Q. OKAY. NOW, IS YOUR FOOT CASTED NOW OR IS IT IN, LIKE, A--A SPLINT OR HOW DO THEY HAVE IT?

A. IT'S, LIKE, IN A--LIKE, IN A SPLINT AND WRAPPED.

Q. OKAY. AND WHEN DO YOU SEE--YOU SAID YOU HAD TO GO SEE AN ORTHOPEDIC SURGEON?

A. RIGHT.

Q. AND WHAT IS THAT DOCTOR'S NAME; DO YOU KNOW?

A. YES. I HAVE IT WRITTEN DOWN. HIS LAST NAME IS SPELLED, S-T--

Q. UM-HUM.

A. --R-O-U-D. I THINK YOU PRONOUNCE IT--

Q. IS IT STROUD?

A. --STROUD.

Q. OKAY. IS THAT--IS HIS FIRST NAME CHARLES?

A. I'M NOT SURE.

Q. DO YOU HAVE A PHONE NUMBER OR ADDRESS FOR HIM?

A. YES. I HAVE A PHONE NUMBER.

Q. OKAY.

A. 248--

Q. UM-HUM.

A. --879--

Q. UM-HUM.

A. --84--

Q. UM-HUM.

A. --41.

Q. OKAY. AND, UM, WHEN ARE YOU SCHEDULED TO SEE HIM?

A. FRIDAY.

Q. OKAY. THAT WOULD BE THE, UH, SIXTH THEM OF JANUARY--

(INAUDIBLE).

A. I--I'M NOT SURE. IF YOU'RE SAYING THE SIXTH, IT'S THE SIXTH.

Q. OKAY. NOW, UM, WHEN YOU FELL, LISA, IN THE, UH, UH, WHEN YOU SLIPPED, UH, HOW FAR AWAY WERE YOU FROM THE CAR?

A. I--

Q. WERE YOU TOWARDS--IS THIS A PICKUP TRUCK, OR--

A. YES, IT'S A FORD RANGER.

Q. (INAUDIBLE) BACK BY THE BED WHERE YOU FELL OR WERE YOU RIGHT BY THE DOOR, OR--

A. I WAS--I WAS RIGHT BY THE DOOR PROBABLY TWO FEET MAYBE.

Q. UM-HUM, UM, DID YOU CLO--DID YOU, LIKE, CLOSE THE DOOR WITH YOUR LEFT HAND AND THEN TWIST TO THE RIGHT TO TURN AND GO, UH, BACK AROUND? OR DID YOU TWIST TO THE LEFT; DO YOU REMEMBER AT ALL?

A. NO, I DON'T. ALL I KNOW IS I TOOK MY LEFT HAND--

Q. UM-HUM.

A. --TO--TO SHUT IT AND THE NEXT THING YOU KNOW I WAS ON THE GROUND.

Q. OKAY. AND IT WAS MAINLY BECAUSE OF THE ICE THEN THAT YOU FELL THEN, HUM?

A. RIGHT.

Q. (INAUDIBLE).

A. (INAUDIBLE).

Q. OKAY. UM, NOW, AND--AND YOU HAVE BEEN TOLD, UM, THAT YOU TOLD ME EARLIER THAT, UM, UH, THE DOCTORS DID TELL YOU THAT YOU PROBABLY WILL HAVE TO GO THROUGH SURGERY; IS THAT CORRECT?

A. YES.

Q. OKAY. UM, ARE YOU EMPLOYED, LISA?

A. YES.

Q. AND WHO ARE YOU EMPLOYED WITH?

A. UNITED STATES POSTAL SERVICE.

Q. OKAY. AND WHAT TYPE OF WORK DO YOU DO FOR THEM?

A. I'M A DISTRIBUTION CLERK.

Q. AND DO YOU WORK A FULL 40-HOUR WEEK?

A. YES.

Q. AND DO YOU WORK ANY OVERTIME?

A. YES.

Q. AND HOW MUCH O--OVERTIME (INAUDIBLE) APPROX--APPROXIMATE IN A WEEK WOULD YOU PUT IN?

A. UM, IT ALL DEPENDS ON HOW MUCH, YOU KNOW, THEY NEED YOU TO WORK. I WOULD SAY AN AVERAGE MONTH, UM, 24 HOURS OF OVERTIME.

Q. SO ABOUT SIX HOURS A WEEK MAYBE, HUM?

A. UH, YEAH.

Q. OKAY. AND HOW MUCH DO YOU MAKE WITH THE POST OFFICE?

A. UM, I'M THINKING AROUND $20-21 AN HOUR.

Q. OKAY. IS THERE ANYTHING ELSE THAT, UM, YOU WISH TO ADD

ABOUT, YOU KNOW, WHAT HAPPENED HERE OR, UM, DID YOU--DID ANYBODY WITNESS THIS ACCIDENT THAT YOU KNOW OF?

A. I WISH SOMEBODY WOULD HAVE--

Q. YEAH, UM-

A. --TO HELP ME.

Q. DID YOU TRY AND GET ANYBODY'S ATTENTION, UM, BEFORE--

A. YES. I HIT MY CAR ALARM--

Q. UM-HUM.

A. --AND, UH (INAUDIBLE) NO ONE, YOU KNOW, RESPONDED TO THAT. I STARTED SCREAMING BUT NOBODY RESPONDED TO THAT. AND THEN I REMEMBER, "I'VE GOT MY CELL PHONE IN MY POCKET."

Q. OKAY.

A. SO I--I GOT MY CELL PHONE OUT AND DIALED 911 AND THEN THEY--I TALKED TO THEM. AND THEN I CALLED MY BOSS WAITING FOR THEM AND HE STAYED ON THE PHONE WITH ME. IN FACT HE PRAYED WITH ME 'TIL THEY GOT THERE.

Q. OH, GOOD, OKAY. HAVE YOU UNDERSTOOD ALL OF MY QUESTIONS, LISA?

A. YES.

Q. HAVE YOUR ANSWERS BEEN TRUE AND CORRECT TO THE BEST OF YOUR KNOWLEDGE?

A. YES.

Q. AND MAY I HAVE YOUR PERMISSION TO TURN OFF THE RECORDING?

A. YES.

Q. O--

END OF RECORDED STATEMENT

DOES H.R. IS OUT WITH PNEUMONIA - ADV WILL CALL TO SEE WHAT INFO I CAN GET - EIP ADV THAT SHE IS REALLY STRAPPED FOR W.L. AS SHE USUALLY LIVES WEEK TO WEEK
01/30/2006

ENTRY DATE: 01 - 05 - 2006 PAGE: 1 OF 1
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: MARY L MACKEY STATEMENT TYPE: OTHER - PIP SIU REFE
PIP SIU REFERRAL
--- AUTOMATIC REFERRAL DUE TO SLIP AND FALL WHILE LOADING VEHICLE / PLEASE ACCEPT CASE FOR INVESTIGATION - I HAVE TAKEN A RECORDED STATEMENT ALREADY IF THIS IS ALLOWED - THANKS MARY MACKEY
NOTIFY USED ON 01/05/2006, SENT TO: HSHW
01/05/2006

ENTRY DATE: 01 - 09 - 2006 PAGE: 1 OF 1
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: GAYLE E FULLER STATEMENT TYPE: OTHER - PIPSIU-FILE
PIPSIU-FILE ASSIGNED TO TRICIA 1-866-235-4274 X49716
NOTIFY USED ON 01/09/2006, SENT TO: LMQ7
01/09/2006

ENTRY DATE: 01 - 09 - 2006 PAGE: 1 OF 5
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU INITI
PIPSIU INITIAL FILE REVIEW
SIU REFERRAL REC'D -- 01/09/06
COVG 2B INVESTIGATED -- VA2-6 (NAMED INSURED)
SIU ISSUE(S) -- AUTOMATIC SIU REFERRAL
INJURED WHILE ENTERING/EXITING VEHICLE
BENEFIT STATUS -- BENEFITS HAVE NOT BEEN SUSPENDED PENDING THE SIU INVESTIGATION
PRIMARY CONTACT PERSON -- MCO REMAINS CONTACT RE PIP BENEFITS
MCO CONTACT -- MARY MACKEY/REQUESTING COPIES OF ALL PIP FILE MATERIAL TO DATE AND COPIES OF ANYTHING REC'D UNTIL SIU INVESTIGATION IS CONCLUDED. REQUESTING THE ORIGINAL RECORDED STATEMENT TO REVIEW

ENTRY DATE: 01 - 09 - 2006 PAGE: 2 OF 5
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU INITI
01/09/2006
---
VA01 OPEN WITH A $1K LOSS RESERVE. APPROPRIATE FOR NOW, BUT THERE IS MENTION OF PENDING SURGERY. MCO WILL CONTINUE TO ADDRESS LOSS RESERVE. NO EXPENSE RESERVE SET - WILL ADDRESS AS INVESTIGATION PROGRESSES.
---
INITIAL ANALYSIS:
AUTOMATIC SIU REFERRAL TO INVESTIGATE LOSS FACTS - INJURED WHILE EXITING/ENTERING VEHICLE. EIP REPORTED THAT SHE WAS LOADING ITEMS INTO HER VEHICLE ON THE PASSENGER SIDE WHEN SHE SLIPPED ON ICE AS SHE CLOSED THE DOOR.
---

(>>>)

ENTRY DATE: 01 - 09 - 2006 PAGE: 3 OF 5
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU INITI
01/09/2006

PLAINTIFF'S EXHIBIT 4 (B)

TUS. HOPING TO HEAR FROM PARAMEDIC SOON AND GET THIS RESOLVED ASAP.

ENTRY DATE: 04 - 10 - 2006 PAGE: 4 OF 5
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - SIU/PIP - 4
04/05/2006
S/W KELLY AT WASHINGTON TWP FIRE DEPT REGARDING MY REQUEST TO S/W THE PARAMEDI CS THAT RESPONDED TO THE SCENE. SHE SAID THAT THEY WOULD LIKE TO S/W ME, BUT W ILL NEED TO ACCOMPLISH THIS IN PERSON - NO RECORDING AT THIS TIME. KELLY WAS C LEAR TO SAY THAT BOTH PARAMEDICS RECALL THE INCIDENT AND FEEL THAT IT IS VERY IMPORTANT TO S/W ME IN PERSON REGARDING THIS - THAT THEY HAVE SOMETHING VERY I MPORTANT TO SAY. SET APPT. FOR 8AM 04/10...
04/06/2006
I VISITED THE WASHINGTON TWP. FIRE DEPT THIS MORNING AND MET WITH PARAMEDICS F ITZSIMMONS AND BLALOCK (AND KELLY). IN PREPARATION FOR THE MEETING THEY REVISI TED THE SCENE. WHEN THEY ARRIVED AT THE SCENE, THE PATIENT WAS LAYING IN THE P ARKING LOT IN DISTRESS. THEY DREW A DIAGRAM ON THE BACK OF MY MAPQUEST (>>>)

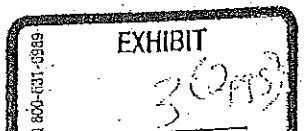
ENTRY DATE: 04 - 10 - 2006 PAGE: 5 OF 5
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - SIU/PIP - 4
04/10/2006
DIRECTIONS THAT WOULD INDICATE THAT THE EIP WAS NO WHERE NEAR A MOTOR VEHICLE WHEN SHE FELL. IN FACT, SHE WAS LAYING ON THE PARKING LOT OUTSIDE OF THE CAR PORT. THERE WAS A WALKWAY NEXT TO THE CAR PORT AND THERE WAS SOME ICE THERE, BUT SHE WAS FOUND JUST OUTSIDE THAT ICE AT THE VERY CORNER OF THE CAR PORT - N OT NEXT TO A VEHICLE. EIP REPORTED TO ALLSTATE THAT SHE SLIPPED AS SHE TURNED TO EXIT THE VEHICLE AND LAID THERE UNTIL EMS ARRIVED. THE EMS DID NOT FIND HER LAYING NEXT TO A VEHICLE - LET ALONE A 2002 RANGER. THE EMS HAD THE RUN REPORT IN FRONT OF THEM WHEN WE SPOKE - AND THEY SUPPORT FULLY EVERYTHING CONTAINED I N THAT REPORT. OUR CONVERSATION WAS NOT RECORDED, BUT THE DIAGRAM IS IN THE FI LE.
04/10/2006

ENTRY DATE: 04 - 10 - 2006 PAGE: 1 OF 4
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU - 4 P
PIPSIU - 4 POINT SUMMARY

COVERAGE: VA 2-6

INVESTIGATION:
REC'D SIU REFERRAL TO INVESTIGATE AUTOMATIC REFERRAL - EIP INJURED WHILE EXITI NG VEHICLE. EIP REPORTED TO ALLSTATE FOUR DAYS AFTER THE LOSS THAT SHE FX HER ANKLE WHILE EXITING HER VEHICLE. EIP REPORTED SPECIFICALLY ON THE APP FOR BENE FITS THAT SHE "SLIPPED AND FELL ON ICE LOADING VEHICLE WITH PURSE & COFFEE MUG & LUNCH." EIP STATED IN RECORDED STATEMENT THAT HER VEHICLE WAS PARKED IN THE CARPORT AT HER CONDO AND SHE HAD JUST PLACED ITEMS INTO HER CAR VIA THE RIGHT FRONT PASSENGER SIDE AND SLIPPED AS SHE TURNED TO SHUT THE DOOR. SHE REPORTED>

ENTRY DATE: 04 - 10 - 2006 PAGE: 2 OF 4
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU - 4 P
04/10/2006
THAT SHE LAID THERE ON THE GROUND AND CALLED 911 WITH HER CELL PHONE. REVIEWED THE ER RECORDS THAT GENERALLY MENTION A SLIP/FALL (THOUGH THERE IS ONE RECORD FROM ER TRIAGE THAT MENTIONS "PT FELL GETTING INTO CAR NOW ANKLE PAIN"). REVIE



WED THE EMS RUN REPORT FROM THE WASHINGTON TWP FIRE DEPT THAT REPORTS "UPON AR RIVAL FOUND PT LYING ON GROUND C/O PAIN TO R ANKLE. PT STATES SHE SLIPPED ON T HE PARKING LOT AREA WHILE WALKING TO HER CAR." INTERVIEWED BOTH REPORTING PARA MEDICS THAT DIAGRAMMED WHAT THEY FOUND UPON ARRIVAL - EIP WAS FOUND IN THE PAR KING LOT, NOT UNDER THE CAR PORT AND NO WHERE NEAR A VEHICLE. THERE WAS NOT A VEHICLE EVEN PARKED IN THE FIRST AVAILABLE PARKING SPOT. IN FACT, EIP WAS IN A WALKWAY AT THE EDGE OF THE CAR PORT WHEN THEY FOUND HER.

ENTRY DATE: 04 - 10 - 2006 PAGE: 3 OF 4
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU - 4 P
04/10/2006
RECOMMENDATIONS:
FORWARDING REQUEST TO FPL TO REVIEW CLAIM FOR FULL DENIAL OF ALL PIP BENEFITS ON THE BASIS OF...
-FALSELY SWORN UNDER OATH TO FACTS REGARDING THE CIRCUMSTANCES OF THIS LOSS A AND THE CLAIM MADE UNDER THE POLICY
-ENGAGED IN FRAUDULENT CONDUCT IN CONNECTION WITH THE ALLEGED LOSS AND/OR CLA M FOR BENEFITS
-MADE MISREPRESENTATIONS REGARDING ISSUES MATERIAL TO THE LOSS IN QUESTION AN D/OR THE CLAIM FOR BENEFITS

RESTITUTION:

ENTRY DATE: 04 - 10 - 2006 PAGE: 4 OF 4
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - PIPSIU - 4 P
04/10/2006
ALLSTATE HAS PAID TO DATE 10919.84...

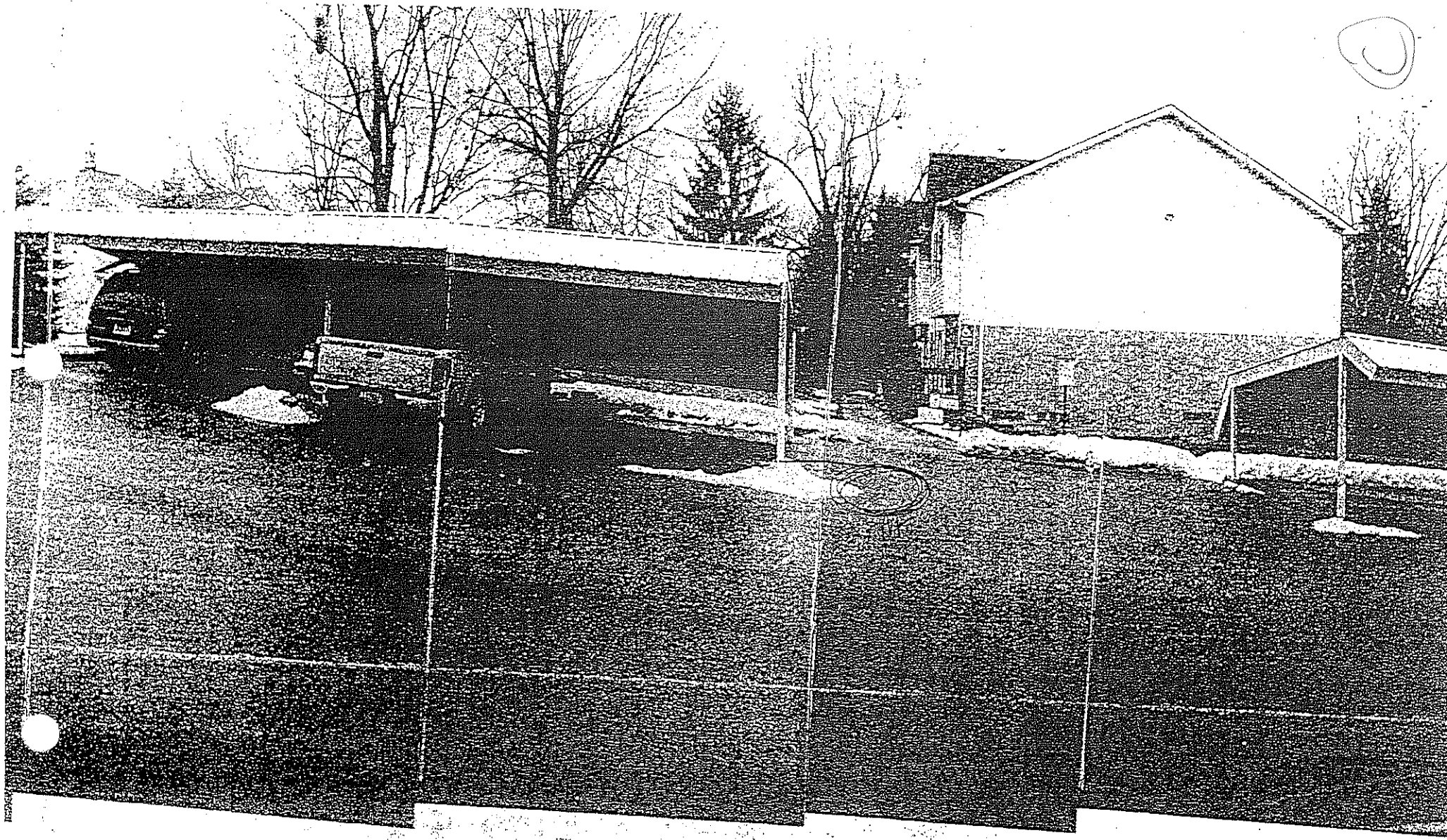
| | |
|---|---|
| MEDICAL ..... | 314.96 |
| MILEAGE ..... | 101.20 |
| WAGE LOSS ..... | 9323.68 |
| ESSN SERVICES ..... | 1180.00 |
| TOTAL INTEREST ..... | 0.77 |

04/10/2006
NOTIFY USED ON 04/10/2006, SENT TO: DS44

ENTRY DATE: 04 - 11 - 2006 PAGE: 1 OF 1
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: JAMES A KARGULA STATEMENT TYPE: OTHER - PIP SIU - TR
PIP SIU - TRICIA, I AGREE WITH YOUR RECOMMENDATION. PLEASE SEE ME REGARDING T HE RESTITUTION ISSUE.
NOTIFY USED ON 04/11/2006, SENT TO: LMQ7
04/11/2006

ENTRY DATE: 04 - 12 - 2006 PAGE: 1 OF 2
ID: 01 MONA L FRAZIER
EMPLOYEE NAME: TRICIA J DZIERWA STATEMENT TYPE: OTHER - SIU FINAL RE
SIU FINAL REPORT - PIP

SIU FINDINGS:
-THAT YOU HAVE MADE MISREPRESENTATIONS REGARDING ISSUES MATERIAL TO THE LO SS IN QUESTION AND/OR THE CLAIM FOR BENEFITS THAT YOU HAVE MADE;
-THAT YOU HAVE BREACHED YOUR CONTRACT OF INSURANCE BY FAILING TO COOPERATE WITH THE INSURER BY FAILING TO TESTIFY TRUTHFULLY AS TO YOUR KNOWLEDGE OF T HE FACTS AND CIRCUMSTANCES CONNECTED WITH THIS LOSS AND YOUR CLAIM MADE UNDE



PLAINTIFF'S EXHIBIT
6 11

DEPOSITION EXHIBIT
4
5.7.07

PLAINTIFF'S EXHIBIT
~~A~~ 12

DEPOSITION EXHIBIT
2
5.7.07